Decision **DRAFT DECISION OF ALJ ECONOME (Mailed 12/14/2004)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

City of San Diego, a Charter City, The Redevelopment Agency of the City of San Diego, a public entity, and Padres, L.P., a limited partnership, Complainants, vs. San Diego Gas and Electric Company, a California Public Utility, Defendant.	Case 04-03-025 (Filed March 10, 2004)

OPINION GRANTING COMPLAINT

I. Summary

The City of San Diego (City), the City's Redevelopment Agency (Agency) and the Padres, L.P. (Padres) (jointly, complainants) bring this complaint to determine whether they, or defendant San Diego Gas & Electric Company (SDG&E), should bear the cost of installation work within a City redevelopment area. The cost of the installation work is $652,575.30. We find that SDG&E's Electric and Gas Tariff Rule 15 does not apply to the installation work, and that SDG&E is responsible for the cost of the installation work.

II. The Dispute

The installation work at issue consists of trenching and installing conduit and substructures for gas and electric service for underground distribution facilities within the East Village Redevelopment Project. This Project includes, among other things, the new Padres Ballpark. Pursuant to a Cooperation Agreement, the parties each paid 50% of the cost of the installation work, $652,575.30, into an escrow account pending resolution of the dispute.

Complainants believe that SDG&E should bear the costs of the Installation Work, because this work represents the completion of SDG&E's duty under the Franchise Agreement and Pub. Util. Code § 6297 to relocate its facilities at its own cost to make way for a valid public use. SDG&E believes it has met the requirements of the Franchise Agreement by removing and relocating its facilities out of the vacated streets. According to SDG&E, the installation work represents a new line extension, the costs of which are governed by Tariff Rule 15, under which complainants are obligated to bear these costs.

III. Procedural Background

On May 24, 2004, a prehearing conference was held. The scoping memo determined that hearings were necessary unless the parties could fully stipulate to the material facts. On September 1, 2004, the parties filed a Joint Stipulation of Facts, thus eliminating the need for evidentiary hearings. We therefore change the initial determination and conclude that hearings in this case are not necessary. The case was submitted with the filing of reply briefs on October 1, 2004.

IV. Motion to Withdraw the Complaint

A. Background

On August 5, 2002, the parties entered into a Cooperation Agreement where the parties, subject to the reservation of their respective rights, shared the cost of the installation work. Section 303 of the Cooperation Agreement provides that, within one year of the agreement, any party to the agreement may bring a legal action in the Superior Court of California for declaratory relief concerning the parties' respective financial responsibility for the installation work.

SDG&E timely filed a declaratory relief action in the Superior Court on January 8, 2003. During the pendency of the Superior Court litigation, the California Court of Appeal published *City of Anaheim v. Pacific Bell Telephone Company (City of Anaheim I)*, 109 Cal. App.4th 381 (4th Dist., Div. 3), which held that the Commission, rather than the Superior Court, had jurisdiction with respect to issues which the parties determined to be similar to those presented in the SDG&E Superior Court action. In *City of Anaheim I*, the issue was cost responsibility for undergrounding utility facilities.

Complainants and SDG&E agreed to stay the Superior Court action until resolution of the jurisdictional issue. Complainants then filed this complaint at the Commission in cooperation with SDG&E in order to resolve the issues in a timely fashion.

The California Supreme Court subsequently granted review in *City of Anaheim I*, and transferred the case back to the Court of Appeal with directions to vacate and reconsider its earlier decision in light of *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132. On June 18, 2004, complainants filed a motion at the Commission to withdraw and / or dismiss this complaint. In the motion, complainants tried to anticipate the outcome of the Court of Appeal's decision on

remand, and believed the court would now hold that it has the jurisdiction to hear the case.

Prior to SDG&E filing its opposition, the Court of Appeal issued a subsequent decision, *City of Anaheim v. Pacific Bell Telephone Company (City of Anaheim II)*, 119 Cal.App.4th 838, review denied at 2004 Cal. LEXIS 9685 (October 13, 2004). In *City of Anaheim II*, the court again determined that the Commission has exclusive jurisdiction to determine whether a defendant is required to pay for putting its facilities underground, and affirmed a ruling sustaining a demurrer without leave to amend.

SDG&E opposes complainants' motion to withdraw. SDG&E argues that the complaint raises issues of Tariff Rule 15 construction and the parties' rights and obligations relative thereto, and that resolution of these matters, and available remedies for a tariff violation, are governed by the Public Utilities Code. SDG&E argues there is an existing policy or ongoing regulatory effort at the Commission that the present action may frustrate because of a potential inconsistent ruling between the Superior Court and the Commission. SDG&E also believes this is a matter of statewide concern and the Commission's relinquishment of its jurisdiction could undermine the consistency of its regulatory regime relative to line extension regulation.

Complainants' reply argues for the first time that the facts of this case differ from those in *City of Anaheim II*, and therefore that this case does not fall within the Commission's exclusive jurisdiction.

B. Discussion

City of Anaheim II analyzed three factors set forth in *People ex rel. Orloff v. Pacific Bell (Orloff)* (2003) 31 Cal.4th 1132 to determine whether the Commission has exclusive jurisdiction. *City of Anaheim II* summarized these factors as

whether the Commission is authorized to make certain policy, whether the Commission has adopted regulations to effect that policy, and whether maintenance of the Superior Court action would interfere with that policy. The court determined that the first two factors were met because the Commission would continue to oversee and regulate where and when utility facilities are put underground for the foreseeable future. As to the third factor, the court held that maintenance of the Superior Court case would interfere with Commission policy regarding relocation of overhead utility infrastructure underground. The court reasoned that plaintiff's attempt to obtain reimbursement for its individual undergrounding expenses potentially might interfere with the equitable determination of the order in which communities throughout the state should have their overhead facilities moved underground, a matter of statewide concern over which the Commission has jurisdiction. The Court then concluded that the existing policy or ongoing regulatory effort would be frustrated by the Superior Court action.

We now apply these factors to this case. In this case, the scoping memo defined the proceeding's scope as whether or not SDG&E's Electric and Gas Rule 15 applies to the installation work for the development area. The first two factors in *City of Anaheim II* are met because there is no dispute that the Commission is authorized to adopt line extension tariffs, and has done so. The third factor, as refined by *City of Anaheim II*, concerns whether maintenance of the Superior Court action potentially might interfere with that policy. If the Commission determines that Tariff Rule 15 governs, and the Superior Court determines that the Franchise Agreement does, the Superior Court's determination could potentially interfere with the Commission's ongoing regulatory effort and

frustrate that effort. Thus, this action is properly before us and we deny the motion to withdraw.[1]

V. The Stipulated Facts

Prior to 1999, SDG&E owned and maintained certain overhead electric transmission and distribution facilities, as well as gas distribution facilities in and along many city streets in San Diego. The electric facilities covered about 24 city blocks, and served about 30 primarily commercial and industrial premises. The electric facilities were primarily poles and overhead conductors, although a system of conduit, manholes and underground devices also existed in several of the streets. The gas facilities consisted of about 30 city blocks of gas main service serving about 21 primarily commercial and industrial customers.

By an April 30, 1999 letter, the City requested SDG&E to relocate its facilities on certain streets because the City intended to vacate portions of these streets and to realign others to accommodate the East Village Redevelopment Project. SDG&E complied with the City's request and removed its facilities in the vacated streets prior to demolition. SDG&E then relocated and reconnected at its own expense some facilities to serve existing customers outside the redevelopment area. Those facilities are not at issue in this complaint.

In December 1999, SDG&E completed the relocation and removal of electric and gas distribution facilities requested by the City's April 30 letter (except for the installation work), and terminated services to previously existing

[1] Furthermore, until complainants filed their reply to the motion to withdraw, all parties believed that this case was factually similar to *City of Anaheim I and II*. If these parties were to return to Superior Court and lift the stay, SDG&E might file a demurrer to the complaint citing *City of Anaheim II*. Thus, judicial efficiency also supports our denying complainants' motion and addressing the merits of the case here.

customers or buildings within the vacated area. By March 2000, SDG&E completed the relocation of its existing electric transmission facilities.

By a May 21, 1999 letter, SDG&E advised the City that extensions to furnish permanent electric service to applicants are made in accordance with its Tariff Rule 15 and services are extended under Tariff Rule 16.[2] By an April 26, 2000 letter, SD&GE advised the city that SDG&E had removed all facilities that it had been instructed to remove and that SDG&E would not take financial responsibility for installing any facilities in the area "where we have removed facilities."

In July 2000, the City formally requested SDG&E to provide gas and electric service to the Padres Ballpark, and subsequently provided SDG&E with the redevelopment agreement for the East Village Redevelopment, which includes the Ballpark. SDG&E delineated the work responsibilities of the project and advised the Padres that the utility would make the new installations under SDG&E's Tariff Rules 15 and 16.

In August 2002, the parties entered into a Cooperation Agreement where, subject to the reservation of their respective rights, the parties shared the cost of the installation work necessary to accommodate the redevelopment area. Pursuant to this agreement, by 2004, installation of the new gas and underground electric and distribution facilities in the new and realigned streets was completed, with the cost of the installation work shared by both sides pending the outcome of this dispute. The installation work at issue in this complaint consists generally of all trench, conduit and substructures necessary

[2] Because SDG&E bases its legal argument entirely on its Electric and Gas Tariff Rule 15, we limit our discussion to those tariff rules.

for the utility service and was performed by the Padres' contractor. SDG&E states it installed all pad-mounted facilities, cable connectors and gas main pipes at no expense to complainants, pursuant to Rule 15, and the cost associated with these facilities does not constitute installation work.

The East Village Redevelopment Project includes the following street improvements:

- Two streets were closed and realigned (10th and 11th Streets);
- Two new streets were built (Park Blvd. and Tony Gwynn Way);
- Three blocks of 10th St., K St. and Imperial Avenue were vacated; and
- Four blocks of 8th, 9th, and L St. were vacated.

Two new customers have taken permanent service from the new gas and underground electric facilities: The Padres Ballpark and the Omni Hotel. The new electric system also serves new street lights and new traffic signals at new intersections. As an example of these new customers' service, the Padres Ballpark paid invoiced utility bills for electricity totaling $131,659.28 and for gas totaling $7,978.98 in May 2004 and $151,277.90 for electricity and $11,007.17 for gas in June 2004.

VI. Complainants' Allegations and SDG&E's Response

The substantive issue presented by this complaint is who bears the cost of the installation work in the East Village Redevelopment area when (1) the City had asked SDG&E to remove its existing facilities from the redevelopment area in 1999; (2) SDG&E complied by 2000; and (3) SDG&E did not have any gas lines in the new or newly aligned streets in the East Village Redevelopment when the

City required the electric and gas facilities to be built to accommodate the East Village Redevelopment.

Complainants assert that Section 8 of the Franchise Agreement between the City and SDG&E states that the relocation of SDG&E facilities, when the City so requires, shall be at the sole cost and expense of SDG&E. According to complainants, Pub. Util. Code § 6297 mirrors this requirement. In order to continue to serve the East Village Redevelopment Area, SDG&E first removed its lines from the vacated streets, and then reestablished service through new, relocated lines in the realigned streets. Complainants therefore argue that SDG&E should bear the cost of this Installation Work.

SDG&E argues that its Electric and Gas Tariff Rules 15, and not the Franchise Agreement and Pub. Util. Code § 6297, governs this case because the work pertains to a new line extension. SDG&E argues that this conclusion logically flows from the facts that: (1) none of the SDG&E customers served within the redevelopment area prior to the removal of SDG&E's facilities remained; and (2) all premises and customers served within the redevelopment area are new development that occurred after SDG&E removed its facilities pursuant to the Section 8 of the Franchise Agreement. SDG&E states that the Franchise Agreement requires SDG&E to change the location of all facilities which conflict with the City's reservation of rights (to construct, install, maintain, etc., improvements in or under the streets and to relocate, remove, vacate or replace the streets), and SDG&E removed the conflict in March 2000 when it removed and relocated the facilities. For these reasons, SDG&E states it has also complied with Pub. Util. Code § 6297. Thus, according to SDG&E, the installation work is a new service to new customers, and is governed by its tariff rules and not the Franchise Agreement and § 6297.

Even if the Franchise Agreement and Pub. Util. Code § 6297 do apply, SDG&E argues that the agreement and statute do not impose upon SDG&E the dual obligation to (1) remove and relocate facilities that conflict with the City's reservation of rights, at SDG&E's expense, and (2) subsequently, to install new service to new customers in the area from which SDG&E previously removed the conflict, at SDG&E's expense.

VII. Cost Responsibility for the Installation Work

In making its argument, SDG&E alleges that it complied with both the terms of the Franchise Agreement and Pub. Util. Code § 6297. Thus, in order to determine if Tariff Rule 15 applies, it is first necessary to determine if SDG&E is correct in this initial premise. We do not interpret the parties' rights and obligations under the Franchise Agreement here because, in general, the jurisdiction to do so lies with the Superior Court. We have the jurisdiction to determine a utility's compliance with the Pub. Util. Code, and therefore first determine whether SDG&E has complied with Pub. Util. Code § 6297. If we determine that SDG&E is obligated to bear the cost of the installation work under § 6297, then it is not necessary to address the application of Rule 15. We hold that the installation work is a relocation under § 6297, and thus, SDG&E is responsible for the cost of this work.

The franchise granted by the City to SDG&E is governed by Pub. Util. Code § 6201 through § 6302. Section 6297 codifies the common law rule that when a public utility accepts franchise rights in public streets, it assumes an implied obligation to pay for relocation of its facilities when necessary to make way for a proper governmental use. This obligation arises out of the paramount right of the people as a whole to use public thoroughfares. *Southern California*

Gas Co. v. City of Los Angeles (1958) 50 Cal. 2d 713, 716-717; see also *City of Livermore v. Pacific Gas & Electric Co.* (1997) 51 Cal. App.4th 1410, 1413.[3]

Pub. Util. Code § 6297 states:

> "The grantee shall remove or relocate without expense to the municipality any facilities installed, used, and maintained under the franchise if and when made necessary by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the construction of any subway or viaduct, by the municipality."[4]

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[3] Section 6297 differs from the common law rule by providing for relocation "without expense to the municipality," instead of at the utility's own expense. The California Supreme Court has held that § 6297 does not alter the implied common law obligations that are assumed by a utility when it accepts a franchise. See *City of Livermore v. Pacific Gas & Electric Co.*, 51 Cal. App.4th at 1413-1414.

[4] The Franchise Agreement also contains a similar requirement. Pursuant to Section 8(a) of the Franchise Agreement, the City reserves the right to, among other things, construct, replace and relocate improvements of any type over, under or in the City streets. The City also reserves the right to relocate, remove, vacate and replace the streets themselves. Section 8 (a) then provides that:

> "[i]f the necessary exercise of the aforementioned reserve rights conflicts with any pipes and appurtenances of Grantee [SDG&E] constructed, maintained and used pursuant to the provisions of the franchise granted hereby, whether previously constructed, maintained and used or not, Grantee shall, without cost or expense to City…, [change] the location of all facilities or equipment so conflicting. Grantee shall proceed promptly to complete such required work." (emphasis added.)

Section 8(b) of the Franchise Agreement further clarifies this arrangement:

> "Irrespective of any other provision of this ordinance, Grantee's [SDG&E's] right to construct, maintain and use, or remove pipes and appurtenances shall be subject at all times to the right of the City, in the exercise of its police power, to require the removal or relocation, of said pipes and appurtenances thereto at the sole cost and expense of Grantee."

The parties do not cite, and we do not independently find, any cases addressing the issue of what constitutes a "relocation" under § 6297 in a redevelopment context under facts similar to the instant case. However, no party disputes that the redevelopment project is a lawful exercise of the City's police power, and is for a valid public purpose. A redevelopment project, viewed as a whole, consists of both demolition and subsequent redevelopment of the affected area.

In order to accomplish the East village Redevelopment Project, existing streets were vacated, realigned, and relocated. Pursuant to § 6297, SDG&E is required to change the location of its facilities (i.e., relocate) in order to accommodate the City's redevelopment. Because we view the redevelopment project as a whole, under § 6297, the City's right to require removal of facilities prior to demolition is independent of the City's right to require the relocation of these facilities upon realignment of its streets once the redevelopment is accomplished.

The timing of the City's request and the location of the customers served should not alter this conclusion. Here, the City asked SDG&E to remove certain of its facilities to accommodate demolition in the redevelopment area, and later requested that SDG&E install (i.e., relocate) facilities in the realigned streets to continue to serve the same area. Section 6297 does not limit the City's right to require relocation only to serve the existing customers of the redevelopment area. Nor does it require that the removal and relocation of the facilities occur at

the same time. Thus, SDG&E may not rely on the gap between demolition and construction to escape its duties.[5]

Based on our conclusion, we find it unnecessary to further address SDG&E's Electric and Gas Tariff Rule 15 in this unique situation.[6]

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[5] SDG&E's argument is also impractical at best. There will always be a gap between demolition and construction. Where, as here, the demolition concerns an area of several city blocks, the gap will inevitably be considerable.

[6] SDG&E argues that the Installation Work falls within Rule 15's definition of a line extension. However, even though we conclude this is not the case, Tariff Rule 15 can be read as harmonious with the outcome we reach today.

SDG&E's Gas Tariff Rule 15 defines a distribution main extension as follows:

> "Distribution Main Extension: the length of main and its related facilities required to transport gas from the existing distribution facilities to the point of connection with the service pipe.
>
> "A main extension consists of new distribution facilities of the utility that are required to extend service into an open area not previously supplied to serve an Applicant. It is a continuation of, or branch from, the nearest available existing permanent Distribution Main, to the point of connection of the last service. The utility's Main Extension includes any required Substructures and facilities for transmission taps but excludes service connections, services, and meters."

Tariff Rule 15 addresses extension of service into an open area "not previously supplied" by SDG&E, and does not specifically address the narrow issue of cost responsibility in this unique situation concerning the City's redevelopment. We similarly are not persuaded by SDG&E's citation to D.97-12-098, 77 CPUC2d 785, because this decision does not address the instant narrow issue concerning franchise obligations.

VIII. Comments on the Draft Decision

The draft decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure.

IX. Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and Janet A. Econome is the assigned ALJ in this proceeding.

Findings of Fact

1. The installation work at issue in this complaint consists of trenching and installing conduit and substructures for gas and electric service for underground distribution facilities within the East Village Redevelopment Project.

2. Pursuant to a Cooperation Agreement, the parties each paid 50% of the cost of the installation work, $652,575.30, into an escrow account pending resolution of the dispute.

3. The Scoping Memo defined the proceeding's scope as whether or not SDG&E's Electric and Gas Rule 15 apply to the installation work for the redevelopment area.

4. The Commission is authorized to adopt line extension tariffs and has done so.

5. If the Commission determines that Tariff Rule 15 governs, and the Superior Court determines that the Franchise Agreement does, the Superior Court's determination could potentially interfere with the Commission's ongoing regulatory effort and frustrate that effort.

6. The Commission has the regulatory authority to determine the application of our tariffs.

7. By an April 30, 1999 letter, the City requested SDG&E to relocate its electric and gas transmission and distribution facilities on certain City streets because the City intended to vacate portions of these streets and to realign others to accommodate the East Village Redevelopment Project. SDG&E complied with the City's request and removed its facilities in the vacated streets prior to demolition. SDG&E then relocated and reconnected at its own expense some facilities to serve existing customers outside the redevelopment area. Those facilities are not at issue in this complaint.

8. In December 1999, SDG&E completed the relocation and removal of electric and gas distribution facilities requested by the City's April 30 letter (except for the installation work), and terminated services to previously existing customers or buildings within the vacated area. By March 2000, SDG&E completed the relocation of its existing electric transmission facilities.

9. In July 2000, the City formally requested SDG&E to provide gas and electric service to the Padres Ballpark, and subsequently provided SDG&E with the redevelopment agreement for the East Village Redevelopment, which includes the Ballpark. SDG&E delineated the work responsibilities of the project and advised the Padres that the utility would make the new installations under SDG&E's Tariff Rules 15 and 16.

10. The East Village Redevelopment Project includes the following street improvements:

- Two streets were closed and realigned (10th and 11th Streets);
- Two new streets were built (Park Blvd. and Tony Gwynn Way);
- Three blocks of 10th St., K St. and Imperial Avenue were vacated; and
- Four blocks of 8th, 9th, and L St. were vacated.

11. Two new customers have taken permanent service from the new gas and underground electric facilities: The Padres Ballpark and the Omni Hotel. The new electric system also serves new street lights and new traffic signals at new intersections. As an example of these new customers' service, the Padres Ballpark paid invoiced utility bills for electricity totaling $131,659.28 and for gas totaling $7,978.98 in May 2004 and $151,277.90 for electricity and $11,007.17 for gas in June 2004.

12. The redevelopment project, viewed as a whole, consists of both demolition and subsequent redevelopment of the affected area.

Conclusions of Law

1. Complainants' motion to withdraw the complaint should be denied.

2. Pursuant to Pub. Util. Code § 6297, SDG&E is required to change the location of its facilities (i.e., relocate) in order to accommodate the City's redevelopment.

3. The installation work is a relocation pursuant to Pub. Util. Code § 6297, and SDG&E is therefore responsible for the cost of the installation work.

4. In order to achieve finality to this dispute, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. San Diego Gas & Electric Company's (SDG&E) Electric and Gas Tariff Rules 15 do not apply to the installation work at issue in this complaint.

2. Pursuant to Pub. Util. Code § 6297, SDG&E is responsible for the cost of the installation work, $652,575.30.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.